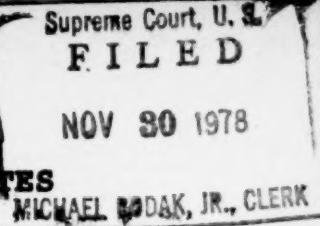


IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978



No. 78-871

HELEN WATERHOUSE SHANNON, Petitioner,

v.

JOHN T. WATERHOUSE, RICHARD
S. WATERHOUSE and ALEXANDER
C. WATERHOUSE, Co-Executors
of the Estate of Martha A.
Waterhouse,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF HAWAII

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Counsel for Petitioner

November 24, 1978

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INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions Presented	3
Constitutional provisions involved	4
Statutory provisions involved . . .	5
Reasons for granting the writ . . .	13
1. The Action by the State Courts in This Proceeding Creates a Sanctuary for a Privileged Class of Citizens, Protecting Them from Suits at Law by Denying access in the Courts to Those Who Would Assert Claims Against Them.	13
2. The Action by the Courts Below was Clearly Erroneous, and Amounts to a Denial of Due Process with Respect to the Petitioner's Claim.	16

3. The Decisions Below, and Recent Decisions by This Court Suggest That the Applicability of the Seventh Amendment to State Court Actions Should be Reviewed.	20
Conclusion	38

CITATIONS

Cases:

<i>Benton v. Maryland</i> , 395 U.S. 784. 3,	20,23
<i>Chau v. Nagai</i> , 353 P2d 998 . . .	15
<i>Duncan v Louisiana</i> , 391 U.S. 145. 3,	20,22
<i>Jacob v New York</i> , 315 U.S. 751. . .	23
<i>Melancon v McKeithen</i> , 345 F. Supp 1025. 22	

Miscellaneous:

<i>Bartholomew, The Gitlow Doctrine Down to Date, II</i> , 54 A.B.A.J. 785.	21
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PETITION FOR A WRIT OF CERTIORARI TO THE
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The Petitioner, Helen Waterhouse
Shannon, respectfully prays that a writ

of certiorari issue to review the judgment and opinion of the Supreme Court of Hawaii entered in this proceeding on April 28, 1977.

OPINION BELOW

The opinion of the Supreme Court of Hawaii is reported in 563 P.2d 391, and is printed in the Appendix hereto. The Journal Entry of Judgment of the First Circuit Court of Hawaii also appears in the Appendix.

JURISDICTION

The opinion of the Supreme Court of Hawaii was entered on April 28, 1977. A timely petition for rehearing was denied on July 28, 1978. On October 30, 1978 Mr. Justice Rehnquist entered an order extending the time for the filing of this petition to and including November 30,

1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Hawaii may arbitrarily deny to some of the citizens of that State the right to a jury trial when such right is expressly guaranteed to all citizens by the constitution and statutes of Hawaii.
2. Whether the state courts of Hawaii may, by the use of legal artifice, refuse to entertain claims against members of the class of wealthy and influential citizens of that State.
3. Whether under the rationale of *Duncan v. Louisiana*⁴ and *Benton v. Maryland*⁵ the Seventh Amendment guarantee of

1. 391 U.S. 145 (1968).
2. 395 U.S. 784 (1969).

the right to a jury trial in civil cases
is applicable to actions in state courts.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Hawaii

Article I

Section 10. In suits at common law where the value in controversy shall exceed one hundred dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

Revised Statutes of Hawaii

§ 635-13-Jury, when of right,

When the right of trial by jury is given by the Constitution or a statute of the United States or this

State and the right has not been waived, the case shall be tried with a jury.

STATEMENT OF THE CASE

Helen Waterhouse Shannon, the petitioner herein, brought suit in the trial court in Hawaii to enforce an oral agreement with the decedent, Martha A. Waterhouse, wherein the decedent promised to will to the petitioner a one-fifth share of her estate. The decedent died in March of 1970, and the will offered for probate in her estate did not include any provision for the petitioner. This action was commenced against the respondents herein in their representative capacity as co-executors of the estate of Martha A. Waterhouse.

At the trial below, the agreement

between the petitioner and the decedent was established by the testimony of the petitioner and by that of a third party. Performance of the agreement by the petitioner was also clearly established by the evidence presented. The petitioner's performance consisted of her forbearance for a period of 25 years to pursue or assert any claims as the legal widow of the decedent's son, Montague Waterhouse, who died in January 1944. Montague Waterhouse had married the petitioner in 1943, and at the time of his death they were living together as husband and wife.

After Montague's death, a question arose as to the validity of the petitioner's marriage to Montague, by reason of reported prior marriages, and in order to avoid unpleasantness to the family which could result from efforts by the peti-

tioner to resolve the question of the validity of the marriage, Martha Waterhouse extracted a promise from the petitioner that she would refrain from taking any action to establish herself as the legal widow of Montague, or to pursue any claims to which she might be entitled as the widow. In exchange for such promise, Martha Waterhouse promised that she would see that the petitioner was taken care of as long as Martha Waterhouse was alive, and that upon her death she would will to the petitioner the share of her estate that would have gone to her son Montague.³

At the close of the petitioner's evidence, the trial court sustained a motion by the respondents for a directed verdict. This result appears to have been

based upon an erroneous interpretation by the trial court of the law pertaining to the statute of frauds, in that the trial court apparently concluded that some "affirmative" performance was required to take an oral agreement out of the statute of frauds. Accordingly the trial court found that the forbearance demonstrated by the petitioner was therefore not sufficient performance to permit enforcement of the oral agreement between the petitioner and the decedent.⁴

On appeal to the Supreme Court of Hawaii, that court specifically found and held that forbearance is sufficient performance to take an oral agreement out of the statute of frauds. However, instead of sending the case back to the trial

4. Tr., p. 478.

3. Tr., p. 346.

court for a trial on the merits, the Supreme Court cited the rule that "forbearance on the part of the party seeking to enforce it must have been primarily and substantially motivated by, and in pursuance of the oral agreement," and then upheld the trial court's decision by declaring: "We agree with the trial court that the plaintiff had not presented evidence from which the jury might reasonably have found, after measuring the evidence against the requisite standard of proof, that her forbearance was primarily and substantially motivated by, and in pursuance of the alleged oral agreement to make a will."⁵ The trial court made no such finding of fact. By determining such issue for itself the

5. See Appendix hereto, p.

Supreme Court of Hawaii apparently decided to assume the responsibility of the original trier of facts in the case, and decided from its review of the record the very issue of fact for which the jury had been impaneled, but which it was not permitted to resolve.

When the petitioner married Montague Waterhouse, she unknowingly married into one of the very wealthy and influential families in Hawaii. During the probate of her husband's estate, the petitioner was aware that stocks and other assets which she believed her husband to have owned were not put into the estate by his family. However, in reliance upon her agreement with her mother-in-law, Martha A. Waterhouse, she refrained from pursuing any of the assets of Montague's estate, and even refrained, to her an-

guish, from taking steps to resolve the uncertainty referred to above regarding her status as the legal widow of Montague. During the life of Martha A. Waterhouse, the petitioner, as Helen Waterhouse, enjoyed the comforts and privileges accorded members of the Waterhouse family, and was well taken care of by Martha Waterhouse and was treated by her as a member of her family. However, she was only grudgingly accorded such status by the brothers of her deceased husband, who are the respondents herein, and upon the death of their mother the respondents ignored the petitioner and denied to her any claim to any interest in their mother's estate. If the decedent made any provisions in her will in favor of the petitioner, it was suppressed by the respondents and not offered for probate.

The action of the trial court in refusing to allow the petitioner's claim against the respondents to be submitted to the jury was objected to and argued against by the petitioner at the time the trial court indicated it was considering such action. See Tr., p. 455. Such action was also complained of by the petitioner in her appeal to the Supreme Court of Hawaii. The amount in controversy is in excess of \$1,000,000.00.

REASONS FOR GRANTING THE WRIT

1. THE ACTION BY THE STATE COURTS IN THIS PROCEEDING CREATES A SANCTUARY FOR A PRIVILEGED CLASS OF CITIZENS, PROTECTING THEM FROM SUITS AT LAW BY DENYING ACCESS IN THE COURTS TO THOSE WHO WOULD ASSERT CLAIMS AGAINST THEM.

The respondents herein were loathe to share their mother's estate with the petitioner. Inasmuch as the fact of the agreement between the decedent and the petitioner was established at the trial by uncontradicted evidence, the respondents were unwilling to allow the petitioner's claim to be submitted to the jury. The trial court granted the directed verdict requested by the respondents, and attempted to justify its ruling with an unsound application of the statute of frauds.

The respondents' family is in a position to wield considerable political and economic influence in the State of Hawaii. The Supreme Court of Hawaii recognized that the trial court's reasoning would not support its decision, but nevertheless sought to affirm the deci-

sion on the basis of factual issues as determined by the Supreme Court. In its wandering through the record in search of support for the trial court's decision, the Supreme Court of Hawaii invaded the province of the jury, and thereby robbed the petitioner of her right to a jury trial in violation of that State's constitution,⁶ the statutes of the State,⁷ and even the Hawaii Rules of Civil Procedure promulgated by the Court itself.⁸ In so doing the Court also apparently disregarded its own previous admonition that the right to a jury trial "must be jealously guarded against any unauthorized encroachment."⁹

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6. Hawaii Const. art I, § 10.
 7. HRS § 635-13.
 8. H.R.C.P. Rule 38(a).
 9. *Chau v. Nagai*, 353 P.2d 998, 1000 (Haw., 1960).

The determination of the issue of fact by the Supreme Court of Hawaii lacks support in the record, and was made in the absence of any findings of fact by the trial court or jury. The rulings in the trial court and the Supreme Court of Hawaii appear from the record to have been motivated, either consciously or unconsciously, by a desire by the courts to accord favored treatment to the respondents, and as such is in violation of the Fourteenth Amendment guarantee of equal protection under the laws. Such action undermines confidence in the court system, and should be corrected wherever it appears. The issuance of the writ is justified for such purpose.

2. THE ACTION BY THE COURTS BELOW WAS CLEARLY ERRONEOUS, AND AMOUNTS TO A DENIAL OF DUE PROCESS WITH RESPECT TO THE PETITIONER'S CLAIM.

The Supreme Court of Hawaii based its decision in this case upon the determination of a fact issue which the Supreme Court indicated had been made by the trial court, and with respect to which they were in agreement with the trial court. See Appendix hereto, p. . However, an examination of the record discloses that the trial court did not make such a finding of fact. In its Order granting the respondents' motion for a directed verdict, the trial court cited as the basis therefor "the reasons stated by the Court in its oral decision." In its oral decision, as reflected in the transcript, the trial court appeared to have interpreted a particular line of cases as having required "affirmative" action rather than "passive" action (such as forbearance) in order to enforce an oral agreement. Accordingly, the trial court determined as a matter

of law that the petitioner's claim was barred by the statute of frauds, and therefore made no findings of fact at all, except perhaps the implied finding that the petitioner's evidence did not demonstrate any affirmative action in her performance of the agreement, which is undisputed. As noted in the Supreme Court's decision below, affirmative action was not required in order to enforce the oral agreement, and the trial court was incorrect in so holding.

The record of the proceeding in the trial court demonstrated that the finding of fact announced by the Supreme Court is erroneous. There is ample evidence in the record from which a jury could reasonably have found that forbearance by the petitioner was primarily and substantially motivated by, and in pursuance of, the alleged oral agreement to make a will.

See Tr. pp 107-108, 117-120, 134, 210 and 217. Further, the factual determination announced by the Supreme Court of Hawaii is a classic example of the type of issue which should be reserved for consideration by a jury, and is certainly not one to be resolved by an appellate court upon review of the record. The very essence of the right to a jury trial demands that every crucial issue of fact presented by the evidence be left to the jury. The subtle shift in the basis for the decision nonsuiting the petitioner from one of interpretation of the law by the trial court to one of determination of an issue of fact by the Supreme Court of Hawaii amounts to an arbitrary denial of the petitioner's right to a jury trial, and deprives her of a valuable property right (her claim against the estate of Martha A. Waterhouse) without due process of law, resulting in a gross miscarriage of justice.

The clearly erroneous actions by the state courts, and the resulting injustice, justify the grant of certiorari to review the judgment below.

3. THE DECISIONS BELOW, AND RECENT DECISIONS BY THIS COURT, SUGGEST THAT THE APPLICABILITY OF THE SEVENTH AMENDMENT TO STATE COURT ACTIONS SHOULD BE REVIEWED.

Prior to this Courts decision in *Duncan v. Louisiana*, 1968, 391 U.S. 145, 88 S. Ct. 1444, this Court had taken the position that the Sixth Amendment guarantee to a jury trial in a criminal proceeding was not applicable to state court actions. In *Duncan* this Court broadened the Fourteenth Amendment guarantee of due process to include the Sixth Amendment right to a jury trial in a criminal proceeding. In *Benton v. Maryland*, 1969, 395

U.S. 784, 89 S. Ct. 2056, the due process clause was further broadened to include the Fifth Amendment guarantee against double jeopardy. Both of these cases involve the review by this Court of state criminal proceedings. However, this Court's reasoning in reaching its decisions in the two cases seems particularly appropriate to a consideration of the Seventh Amendment guarantee of a jury trial in civil proceedings. Other cases before *Duncan* set the stage for the *Duncan* and *Benton* decisions by broadening the due process clause to apply practically all of the First Eight Amendment guarantees to the States. See in this regard Bartholomew, *The Gitlow Doctrine Down to Date, II*, 54 A.B.A.J. 785 (1968). For a more recent discussion pertaining to the reasons for and against applying the Seventh Amendment

guarantees to the States, with exhaustive citations of cases, see *Melancon v. McKeithen*, 345 F. Supp 1025 (U.S.D.C., E.D. La., 1972).

In *Duncan*, this Court makes the statement that in resolving conflicting claims concerning the meaning of the due process clause of the Fourteenth Amendment, "the Court has looked increasingly to the Bill of Rights for guidance." 391 U.S. at 147, 148. The Court then announced the test for determining whether a Bill of Rights guarantee is applicable to state actions depends upon whether the right is among those "fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions," and whether it is "basic in our system of jurisprudence." 391 U.S. at 148, 149. In *Benton* the test announced in *Duncan* was

reaffirmed and strengthened, the court in *Benton* stating, at 395 U.S. 795; "Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice' (citing *Duncan*) the same constitutional standards apply against both the State and Federal Governments." It has long been universally held by this Court and most state courts that the right to a jury trial in a civil proceeding is a "fundamental principal" of liberty lying at the base of our civil and political institutions, and "basic in our system of jurisprudence," within the meaning of *Duncan*, and is "fundamental to the American scheme of justice," within the meaning of *Benton*. See, for example, *Jacob v. New York*, 1942, 315 U.S. 751, 62 S. Ct. 854, and other cases cited in *Melancon*, supra. The force of the reasoning in *Duncan* and *Benton* applies squarely

to the Seventh Amendment guarantee of the right to civil jury trial, particularly when viewed in light of the circumstances presented in this case.

Historically, the jury system has served as the protector of individual freedoms and rights against the tyranny, oppression and corruption of judges. Instances of corruption or oppression may now be rare; however, enough horrifying examples abound in the early, and not so early, history of the law to convince us of the wisdom and necessity of continuing and strengthening the jury system. In addition, an occasional state court proceeding, such as the one conducted below in this matter, serves to remind us that the jury function is a vital and indispensable part of our legal process, and that the constitutional power of the jury must not be allowed to be eroded or sup-

planted. Hawaii is the youngest State in the Union, having been admitted less than 20 years ago. Prior to statehood, political and economic power in the Island had been held for several generations by a small group of families, known locally as the Big Five. The dissipation of the power of the Big Five since statehood has been slow, perhaps due in part to the isolation of Hawaii from the mainland by the Pacific Ocean. Consequently, the economic and political influence of the Big Five families and their descendants is pervasive throughout the Island. The respondents herein are members of one of the Big Five families, and the effect of the influence of the respondents on the trial court and Supreme Court of Hawaii is obvious from a reading of the record. This influence could not have been expected to have had any appreciable impact on

the jury, and the right to a jury trial, if accorded to the petitioner, would have served its traditional purpose in this case of assuring to the petitioner a right to be heard on her claim by an impartial trier of facts.

The strength of the American system of government is found in the court system, which not only protects the individual from the powers of those in control of the government but also ensures that each citizen shall be entitled and have the opportunity to assert his rights against the entire world, with no disparity of treatment between citizens, regardless of status, class, wealth or influence. A more sinister evil to the legal system cannot be imagined than to pervert that system so as to favor the wealthy or politically powerful and to deny to others the right to assert a legal claim against

them. The demoralizing effect resulting from such treatment, and the resulting loss of confidence in the court system does immeasurable damage to our system of government. It is therefore imperative that the jury system be preserved in civil cases, and that no hint of favoritism ever be allowed to be demonstrated by the court system in controversies involving wealthy and influential citizens.

In the proceedings below, the petitioner was consistently denied at every stage of the proceeding the opportunity to assert and enforce her claim against the respondents. Prior to the trial, attorneys who represented the petitioner in early stages withdrew, leaving the petitioner to proceed without counsel on several occasions. Numerous other local attorneys were approached by the petitioner and declined to assist her because of

"conflicts of interest." The intimidating influence of the respondents' political and economic power was thus asserted in the earliest stages of the controversy, and continued to make its presence known throughout the proceedings. Commencing with the beginning of the trial, when the general public and the petitioner's friends were excluded from the courtroom, and ending one month later with the directed verdict and denial of a new trial, the entire performance in the trial court was orchestrated and directed by counsel for the respondents, with each player dutifully coming in on cue and following the program as expected. Only the petitioner and her counsel strayed off-tune, and their contribution was drowned out and dismissed as a mere insignificant annoyance.

The facts established in the record in this proceeding clearly demonstrate that the petitioner succeeded in presenting a legitimate claim against the respondents, and that her claim was arbitrarily and summarily brushed aside, both in the trial court and in the Supreme Court of Hawaii. Although the parties went through the form of a legal proceeding, such was a mere formality, with the outcome having been a foregone conclusion. The refusal of the trial court to submit the case to the jury, and the refusal of the state appellate court to return the case for trial by jury, effectively denied to the petitioner the substance of a legal proceeding. There can be no truly legal proceeding in the absence of an impartial trier of facts, independent from any social, political or economic influence of the parties.

A review of the facts in this proceeding illustrates grievous harm perpetrated by the denial of a jury trial. The petitioner herein was married in 1943 to Montague B. Waterhouse, who was at the time a newly commissioned officer and pilot in the United States Army Air Force. The couple was married in the Kings Highway Christian Church in Shreveport Louisiana, and lived together in Battle Creek Michigan, where Montague was stationed until his death in an airplane crash in January, 1944. Montague left a will which was dated November 21, 1943, and reads as follows: "I, Montague B. Waterhouse, being in sound mind do hereby leave to my wife, Helen Bell Knight Waterhouse, all my property, stocks, bonds, currency, etc. in event of my death. Montague B. Waterhouse 2nd Lt. A.C." After a long delay, during which the petitioner attempted without

success to obtain a list of the stocks and properties owned by her deceased husband, the will was finally admitted to probate in Case No. 95405, Superior Court of San Francisco County, California, on January 11, 1946, at which time the petitioner was appointed as Administratrix with Will Annexed. Shortly thereafter, the petitioner began a more determined effort to discover the assets belonging to the estate, and to have them included in the probate proceedings. These efforts were strongly opposed by Montague's mother, Martha A. Waterhouse, who persistently resisted efforts by the petitioner to obtain control and possession of her husband's property and stocks, and refused even to disclose the description or amounts of Montague's estate. The confrontations between the petitioner and Martha Waterhouse regarding the estate of Montague resulted in a suit was resolved by, the

agreement between the petitioner and Martha Waterhouse, established at the trial as having been entered into in April 1946. Under the terms of the said agreement, the petitioner ceased her efforts to obtain control and possession of Montague's stocks and properties, and refrained from pursuing her intended course of action to remove all question as to her status as the legal widow of Montague. Martha Waterhouse agreed in return to hold Montague's stocks and properties for the petitioner until Martha Waterhouse's death, at which time they were to go to the petitioner, and further agreed to will to the petitioner the share of Martha Waterhouse's estate (1/5) which would have been left to Montague.

The existence of the stocks belonging to Montague was not denied by Martha Waterhouse. She claimed that they were part of

a family owned business (Alexander Properties Co., Ltd.) and that the stocks should remain in the family, at least during the lifetime of Martha A. Waterhouse. The petitioner agreed to that arrangement, but did not agree to give up her right to the stocks forever. Martha Waterhouse paid to the petitioner certain sums of money each year, which the petitioner assumed to be income from the stocks. Evidence tending to establish ownership of certain stocks by Montague, including either 50 or 200 shares of Alexander Properties was introduced at the trial by the petitioner. The respondents offered letters tending to show that Montague's stock had been sold at his request prior to his death. A constructive trust over Montague's stocks was claimed in the petitioner's original petition, and evidence of the existence of such stocks

was presented at the trial. It was clearly erroneous to refuse to allow the jury to consider such evidence. The value of 50 shares of Alexander Properties stock was alone in excess of \$80,000.00 The Decree of Final Distribution entered in the Estate of Montague B. Waterhouse in October, 1946 distributed to the petitioner all of the property and estate of Montague, and "any other property not now known or discovered, or for any reason not herein mentioned, belonging to said estate, or in which said estate may have any interest." The petitioner should have been permitted to discover and establish what stocks and properties belonging to Montague at his death were being held by Martha A. Waterhouse at the time of her death in 1970.

The respondents attempted to discredit the petitioner, and cast doubt upon the

legitimacy of her claim, by offering evidence to show that Montague may have been married before his marriage to the petitioner, thereby implying that his marriage to the petitioner may have been invalid. The respondents' proof in this regard was a marriage license taken out by Montague and one Peggy Noonan, and a subsequent property settlement agreement between them. Such proof was woefully inadequate to overcome even the presumption of the validity of petitioner's marriage, particularly in view of the language of Montague's will, his status as a military officer, and the fact that prior to his death he had initiated action to name the petitioner as his beneficiary on his military insurance. Further, Peggy Noonan disclaimed any interest in the estate of Montague, which disclaimer was introduced into evidence. Peggy also did not contest

the probate of Montague's will naming the petitioner as the sole beneficiary.

The agreement between the petitioner and Martha Waterhouse required the petitioner to refrain from pursuing her efforts to resolve uncertainties regarding her status as the legal widow of Montague. She kept her agreement for 25 years until the death of Martha Waterhouse. The petitioner's loyalty to her promise constituted an incalculable sacrifice on the part of the petitioner, and required her to suffer in silence wondering if, in fact, there was proof that Montague was married at the time of his marriage to the petitioner, notwithstanding her strong convictions to the contrary. Her performance of the agreement was in good faith; she proved both the agreement and her performance by uncontradicted testimony at the trial. She was entitled to

have a jury determine her right to recover by reason of her performance of the agreement.

This case is full of irregularities, and unexplained mysterious happenings bordering on the bizarre. Such incidents are too numerous to detail herein. However, a few that can be mentioned are: the appointment in Montague's estate proceedings of the Crocker National Bank as Special Administrator, without anyone interested in the estate having requested such appointment; the execution of a new will by Juliette Alexander, an incompetant aunt of Montague's, shortly before her death and during the perior of her incompetancy, which will omitted Montague Waterhouse but included Montague's brothers and sister, and which was probated subsequent to the death of Martha Waterhouse; the untrue testimony of one of the respondents, John

T. Waterhouse, on deposition, and the "correcting" of the deposition with insufficient notice to the petitioner of the correction in order to permit new discovery prior to trial. Only by a full airing of all facts surrounding this case before an imparital jury can the mysteries and clouds of doubt of suspicion ever be dispelled in this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Hawaii.

Respectfully submitted,

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November 24, 1978

Supreme Court, U. S.

FILED

DEC 26 1978

MICHAEL RODAK, JR., CLERK

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

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APPENDIX TO
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SUPREME COURT OF HAWAII

DECISIONS BELOW

I. Opinion of the Supreme Court of Hawaii,

reported at 563 P.2d 391.

Helen Watershouse SHANNON,

Plaintiff-Appellant,

v.

John T. WATERHOUSE et al.,

Defendants-Appellees.

No. 5610.

Supreme Court of Hawaii

April 28, 1977.

Syllabus by the Court

1. On a motion for a directed verdict, the evidence is to be viewed in the light most favorable to the party opposing the motion, and where from the evidence a jury could reasonably conclude that the plaintiff's claim is sustainable, the motion should be denied, but where the evidence is not sufficient to take the case to the jury, the trial court should grant the motion for a directed verdict.

2. Performance or part performance of a contract required to be in writing will take the matter out of the statute of frauds where the party seeking to enforce it has acted to his detriment in substantial reliance upon the oral agreement.

3. Forbearance to exercise a right is good consideration for a promise.

4. But a showing of forbearance, in and of itself, is not sufficient part performance to remove a verbal agreement from the operation of the statute of frauds.

5. Assuming the existence of an oral contract, the forbearance on the part of the party seeking to enforce it must have been primarily and substantially motivated by and in pursuance of the agreement.

6. An oral contract to make a will must be established by clear and convincing evidence, and the proof of its part performance must be established by a sim-

ilar quantum and quality of evidence.

Gene Bridges, Honolulu, for plaintiff-appellant.

William L. Fleming, Cades, Schutte, Fleming & Wright, Honolulu, for defendants-appellees.

Before RICHARD, C. J., and KOBAYASHI, OGATA, MENOR and KIDWELL, JJ.

PER CURIAM.

This is an action for breach of an alleged oral contract to will property to the plaintiff. The suit was brought against the executors of the estate of Martha A. Waterhouse, who died testate on March 25, 1970.

Trial was had before a jury. At the close of the plaintiff's case, the defendants moved for a directed verdict. The trial court granted the motion, and the plaintiff appeals. The trial court based

its ruling on noncompliance with the statute of frauds. HRS § 656-1.

On a motion for a directed verdict, the evidence is to be viewed in the light most favorable to the party opposing the motion, and where from the evidence a jury could reasonably conclude that the plaintiff's claim is sustainable, the motion should be denied. *Stewart v. Budget Rent-A-Car*, 52 Haw. 71, 470 P.2d 240 (1970); *Royal State Nat'l. Ins. v. Labor Bd.*, 53 Haw. 32, 487 P.2d 278 (1971). Conversely, where the evidence is not sufficient to take the case to the jury, the trial court should grant the motion for a directed verdict.

A parol agreement to make a will comes within the statute of frauds. HRS § 656-1. The plaintiff-appellant, however, asserts performance on her part as a basis for relief from the operation of the stat-

ute. Performance or part performance of a contract required to be in writing will take the matter out of the statute of frauds, where the party seeking to enforce it has acted to his detriment in substantial reliance upon the oral agreement.

McIntosh v. Murphy, 52 Haw. 29, 469 P.2d 177 (1970). The plaintiff-appellant's position essentially is that in consideration for the decedent's promise to will her part of her estate, she agreed to refrain, and did refrain, from taking certain steps consistent with her claim to being the lawful widow of the decedent's son, Montague Waterhouse.

The plaintiff-appellant was married to Montague Waterhouse, a son of the decedent on October 29, 1943. He was killed in an airplane crash on January 8, 1944. The record shows that at the time of her marriage to Montague, he might not have been

lawfully divorced from a previous wife. The appearance of the latter as a widow-claimant to Montague's estate, the probate records of his estate, and the plaintiff-appellant's conduct in connection therewith appear to support the conclusion that at the time of his marriage to the plaintiff-appellant, Montague had a legal wife then living. The plaintiff-appellant, however, maintains that she has never conceded that she was not the lawful widow of Montague Waterhouse.

The oral agreement upon which the plaintiff-appellant relies was allegedly entered into in April, 1946. She claims the decedent orally reaffirmed it sometime in 1963. The decedent died in 1970. In the interim, the plaintiff had remarried, to one Shannon in 1952. She was divorced from him in 1959.

Forbearance to exercise a right is good

consideration for a promise. *Loo Ngawk v. Cartwright*, 7 Haw. 401 (1888); *Troussseau v. Cartwright*, 10 Haw. 138 (1895); *Metropolitan Cas. Ins. Co. v. Realty Development Co.*, 32 Haw. 667 (1933). See also 1 Corbin on Contracts, § 140. In this jurisdiction it has been stated:

"Forbearance to sue on a disputed claim, even though it is an invalid one, is a good consideration for a new promise or a compromise, where the party forbearing is acting in good faith. But if he knows the claim to be unfounded and gains an advantage by it through a compromise, his action is fraudulent, and no consideration arises." *United States v. Aloiau and Kauhoe*, 2 U.S.Dist. Ct. 278 (Hawaii, 1905) (syllabus).

But the mere proof of forbearance is not evidence of part performance sufficient to remove a verbal agreement from the operation of the statute of frauds.

See *Fairall v. Arnold*, 226 Iowa 977, 285 N.W. 664 (1939); *Levi v. Murrell*, 63 F.2d 670 (9th Cir. 1933), cert. denied 290 U.S. 638, 54 S.Ct. 55, 78 L.Ed. 554. Much more must be shown by the party relying upon it. And while we do not go so far as to say that the act of forbearing must be "unequivocally" or "exclusively" referable to the verbal contract, see *Fairall v. Arnold*, *supra*, we do hold that the forbearance on the part of the party seeking to enforce it must have been primarily and substantially motivated by, and in pursuance of the oral agreement. Cf. *McIntosh v. Murphy*, *supra*; *Perreira v. Perreira*, 50 Haw. 641, 447 P.2d 667 (1968).

Moreover, an oral contract to make a will must be established by clear and convincing evidence. And to remove it from the operation of the statute of frauds, its part performance must be es-

tablished by a similar quantum and quality of evidence. 1 Bowe-Parker: Page on Wills, § 10.43.

Based on the foregoing considerations, we find from the record no reversible error. Assuming the existence of an oral contract to make a will, a serious question existed as to whether the alleged forbearance on the part of the plaintiff-appellant was directly referable to the agreement. We agree with the trial court that the plaintiff had not presented evidence from which the jury might reasonably have found, after measuring the evidence against the requisite standard of proof, that her forbearance was primarily and substantially motivated by, and in pursuance of the alleged oral agreement to make a will.

Affirmed.

II. Order of Trial Court granting directed

verdict, filed in the First Circuit Court of Hawaii on October 15, 1973.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HELEN WATERHOUSE SHANNON,

Plaintiff,

v.

JOHN T. WATERHOUSE, et al.,

Defendants.

CIVIL NO. 32646

ORDER GRANTING DEFENDANTS'

MOTION FOR A DIRECTED VERDICT

Defendants, on October 1, 1973, during the trial of the above-entitled case and and after the plaintiff rested her case, made an oral motion pursuant to Rule 50(a) of Hawaii Rules of Civil Procedure for a directed verdict in their favor and against the plaintiff. The Court, after having heard the arguments of counsel and having considered the authorities presented on

behalf of the parties found, for the reasons stated by the Court in its oral decision, that the evidence presented by the plaintiff was insufficient to create an issue of fact for the jury and that said motion should be granted;

IT IS HEREBY ORDERED that said Motion for a Directed Verdict made on behalf of the defendants be and it is hereby granted;

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants and against the plaintiff dismissing this action with costs.

DATED: Honolulu, Hawaii, this 15th day of October, 1973.

/s/ NORITO KAWAKAMI

JUDGE OF THE ABOVE-ENTITLED COURT

III. Judgment of Trial Court, filed October 16, 1978, in the First Circuit of Hawaii.

HELEN WATERHOUSE SHANNON,

Plaintiff,

v.

JOHN T. WATERHOUSE, et al.,

Defendants.

CIVIL NO. 32646

JUDGMENT

Pursuant to the Order Granting Defendants' Motion for a Directed Verdict filed herein on October 15, 1973, it is hereby;

ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing, that this action be dismissed on the merits as against all defendants and that defendants recover from the plaintiff their costs to be taxed in this action.

DATED: Honolulu, Hawaii, this 16th day of October, 1973.

/s/ NORITO KAWAKAMI /Seal/

JUDGE OF THE ABOVE-ENTITLED COURT